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ACQUISITION AND LOSS OF RIGHTS OF BUYERS AND SELLERS TO GOODS UNDER THE UNIFORM COMMERCIAL CODE

PHIL CARTER*

I. DOCUMENTS OF TITLE: A BRIEF HISTORY

It was at common law that the first steps were taken to tie ownership rights in goods to the document of title. In taking these first steps, the courts were influenced by the needs of merchants and their bankers. For example, a seller often needed to borrow against the price due on arrival of goods in transit. The bill of lading, the seller/shipper named consignee, served as collateral when indorsed and delivered to a bank. To protect this transaction, the courts held that the shipper lacked power to deal with the goods so as to prejudice the rights of a transferee of the bill. Carriers that redelivered to the seller/shipper without surrender of the bill were held liable for conversion.¹ Similarly, the courts protected a transferee from the seller/consignor's right to stop goods in transit to the insolvent transferor of the bill.² Thus, the document came to be a "symbol" of the goods, in the sense that transfer of it fixed the transferee's rights both as against his transferor and as against third persons.

To some extent at common law, and more thoroughly under the Uniform Commercial Code and its predecessor uniform acts, documents were classified as negotiable and non-negotiable. A document was non-negotiable unless it ran in the first instance to order or bearer. A carrier or warehouseman was not required to deliver goods held under a negotiable document except upon surrender of it. The negotiable document was treated as a symbol of the goods in the sense that transfer of it fixed the transferee's rights against both his transferor and third persons. On the other hand, so long as the goods were shipped or warehoused under a non-negotiable document, the bailee was given the right to deliver without its surrender. Recognition of this right to deliver without surrender of the non-negotiable document carried with it the idea that a transferee of the document was not to receive favored treatment. Since surrender of the document to the bailee was not required, no special consequences were attached

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¹ *Union Pac. Ry. Co. v. Johnson*, 45 Neb. 57, 63 N.W. 144 (1895); *Garden Grove Bank v. Humeston & So. Ry.*, 67 Iowa 526, 25 N.W. 761 (1882).

² *First Nat'l Bank v. Schmidt*, 6 Colo. App. 216, 40 Pac. 479 (1895); *Lee v. Kimball*, 45 Me. 172 (1858); *Chandler v. Fulton*, 10 Tex. 2 (1853).

to its transfer, at least insofar as third persons were concerned. Transfer of it might serve to fix the transferee's rights as against his transferor, but not as against third persons. The consignee under a straight bill was given power to receive and sell the goods free of all claims of an earlier transferee or holder of the bill.³ This meant that the straight bill was not desirable collateral for advances to the shipper. Likewise, the transferee from the buyer was not favored in the event that the seller/shipper stopped the goods in transit.⁴

II. THE SELLER

A. *The Seller's Right to Reclaim Goods Delivered to an Insolvent or Repudiating Buyer: The Effect of Resale by the Buyer*

A seller who turns over goods to his buyer without securing their price in exchange may find himself in difficulty. For instance, suppose that goods are delivered on credit to a buyer who the seller mistakenly believes is solvent. Since a judgment for the price may be collectible for only a few cents on the dollar, the seller would prefer to recover the goods themselves. The Code provides the seller with this remedy.⁵ Likewise, when the sales contract requires the buyer to pay on receipt of the goods, should he not pay as agreed, the seller's only meaningful remedy may be whatever right he has to recover the goods. Here again, the Code makes this remedy available to the seller.⁶

However, the seller's right to recover goods delivered to an insolvent or defaulting buyer is subject to an important limitation. By obtaining delivery of the goods, the buyer secures the power to defeat the seller's right to reach them. Should the buyer resell, the seller's claim will be lost, provided that the sub-buyer is unaware of this claim.⁷ Under Section 2-403(1), the sub-buyer, by showing that the "goods have been delivered under a transaction of purchase" and that he is a "good faith purchaser for value," makes out his right to take and hold the goods free of the seller's claim.⁸ In addition,

³ C. E. White & Co. v. Century Sav. Bank, 229 Fed. 975 (7th Cir. 1916).

⁴ Kasden v. New York, N.H. & H.R.R., 104 Conn. 479, 133 Atl. 573 (1926); Quality Shingle Co. v. Old Ore. Lumber & Shingle Co., 110 Wash. 60, 187 Pac. 705 (1920); Gass v. Southern Pac. Co., 152 App. Div. 412, 137 N.Y. Supp. 261 (1912).

⁵ UCC § 2-702(2) provides that: "Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt. . . ."

⁶ UCC § 2-507(2).

⁷ UCC §§ 2-702(3), 2-507, Comment 3.

⁸ Under §§ 2-403(1)(b) and (c), the buyer's power to defeat the seller's claim is recognized even though "the delivery was in exchange for a check which is later dishonored, or it was agreed that the transaction was to be a 'cash sale.'" Previously, even in the commercial context, some courts had refused to protect the sub-buyer. Weyerhaeuser Timber Co. v. First Nat'l Bank, 150 Ore. 172, 38 P.2d 48 (1935); John S.

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Section 2-403(2) might also be applicable, since delivery to the buyer would amount to an "entrusting of possession of goods." If the buyer was a "merchant who deals in goods of that kind," he would secure power to resell the goods free of the seller's claim, provided that the sub-buyer was a "buyer in ordinary course of business."⁹

Often, to deliver goods after their sale, the seller does not himself hand over these goods to the buyer, as, for instance, when the contract requires shipment by the seller to the buyer. Suppose a contract for the sale of lumber, between a Seattle seller and a Chicago buyer, which calls for delivery F.O.B. Seattle. The question of what rights this seller has, should the buyer be insolvent or refuse to pay, is complicated by the fact that the seller does not himself turn over the lumber, the contract instead requiring shipment by him from Seattle to his buyer in Chicago.¹⁰

First of all, should the buyer repudiate or become insolvent before shipment has been made, the seller is not, of course, required to make the shipment.¹¹ What, however, if the repudiation or insolvency occurs after the shipment has been made? If the contract calls for payment at Chicago after arrival there of the lumber,¹² the Code does not require the seller to give up control of the lumber except in exchange for this payment.¹³ The Code permits the seller to ship under a negotiable bill of lading, taken to his own order. The carrier could not, of course, deliver to the buyer except on surrender by him of this bill, properly indorsed.¹⁴ Attaching a sight draft on the buyer, the seller might indorse and turn over this bill to his bank at Seattle, his bank in turn arranging for its Chicago correspondent to deliver these documents to the buyer in exchange for the price of the lumber.¹⁵ Instead of taking an order bill, the seller might ship under a straight bill, consigning to himself or his nominee. The carrier could not deliver to the buyer except on the seller's instruction, which instruction the seller would give only when the buyer made the agreed payment.¹⁶ By arranging for shipment in either way, the seller assures

Hale & Co. v. Beley Cotton Co., 154 Tenn. 689, 290 S.W. 994 (1927); Freeman v. Kraemer, 63 Minn. 242, 65 N.W. 455 (1895).

⁹ UCC § 1-201(9).

¹⁰ UCC § 2-319(1)(a).

¹¹ UCC §§ 2-702(1), 2-703(a).

¹² UCC § 2-310(a).

¹³ UCC §§ 2-310(b), 2-505(1).

¹⁴ UCC §§ 7-403(1) and (4).

¹⁵ Besides arranging for presentation of the documents to the buyer and for collection of the price, the seller's bank might also extend credit to him pending collection, the goods covered by the order bill serving as collateral for this advance. For a discussion of the commercial importance of documents of title and statistics as to the types used, see Britton, *Negotiable Documents of Title*, 5 *Hastings L.J.* 103 (1954).

¹⁶ UCC §§ 7-403(1) and (4).

that the buyer will not take the lumber without making the agreed payment.¹⁷

The seller might, however, elect not to ship under "reservation," that is, to consign to himself under a straight bill, or to take a negotiable bill to his own order. Instead, he may have arranged for shipment under a straight bill, buyer named consignee, relying on the buyer's agreement to remit the price when he receives the lumber. Or, the deal might not require the immediate payment of the price, or the acceptance of a time draft, in which event the seller's retention of control of the lumber after its shipment would be inconsistent with his agreement to let the buyer take the goods on open credit terms.¹⁸

What, then, if the buyer repudiates or becomes insolvent after the shipment is in transit? Since the seller shipped under a straight bill, buyer named consignee, the terms of his contract with the carrier do not save for him control of the lumber after its shipment. Even so, the Code in some circumstances does give the seller/consignor a right to instruct the carrier to withhold the goods from an insolvent or repudiating buyer.¹⁹ This right to stop delivery, when available, will make unnecessary an action to recover the goods from the buyer.

Just as the seller's right to recover goods from the buyer's own hands may be defeated by resale of these goods, when a carrier or warehouseman holds the goods, so also is it possible for the buyer to defeat the seller's right to stop delivery, along with his claim to the goods. The question of whether the buyer has this power to defeat his seller's rights will depend on whether the bailee carries or holds under a negotiable or non-negotiable document.²⁰

¹⁷ In the unlikely event that the carrier delivered to the buyer without surrender by him of an order bill, or without the seller's instruction if the seller had consigned to himself under a straight bill, this would not prejudice the right of the holder of an order bill, or of the seller, to reach and recover the goods. If the buyer resold, these goods could be retaken even from a "buyer in ordinary course of business." UCC §§ 7-502(2), 2-403(2); *Albers Bros. Milling Co. v. Drumheller*, 280 Fed. 217 (W.D. Wash. 1922).

¹⁸ UCC § 2-505(2).

¹⁹ UCC § 2-705.

²⁰ Goods often are held or carried under a non-negotiable document. For instance, when the seller has decided to ship on open credit terms, there is no reason for him to ship under a negotiable bill. Negotiable bills seem not to have been adapted to air and truck shipments, since terminal facilities are often inadequate and periods of transit short. The owner of warehoused goods cannot easily sell in small lots to several buyers where the original receipt for the full quantity is negotiable. Instead, he will need a non-negotiable receipt against which he can issue delivery orders. Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 Yale L.J. 1057, 1076-78 (1954).

B. *The Seller's Right to Stop Delivery of Goods to an Insolvent or Repudiating Buyer: The Effect of Resale by the Buyer*

- (1) Carrier or Warehouseman Holds Under a Non-negotiable Document but Has Not Delivered or Attorned to the Buyer or Sub-Buyer

Suppose that a bailee holds the goods under a non-negotiable document but has not attorned, either to the buyer at the time of resale or to the sub-buyer when the seller gives notice of his claim to the goods? Of the several transactions which fit this description, the two following may serve as representative examples:

- (1) The seller ships under a straight bill of lading, consigning to himself, and indorses and delivers this bill to the buyer. After resale the buyer indorses and delivers this bill to the sub-buyer. Before the carrier has attorned to the sub-buyer, the seller notifies it to stop delivery of the goods.
- (2) At the time of their sale a warehouseman holds the goods for the seller under a non-negotiable receipt issued to him. Following the sale, the seller instructs the warehouseman to attorn or deliver to the buyer. Before attornment to him, the buyer resells, giving the sub-buyer a delivery order. The seller notifies the warehouseman to stop delivery before acceptance by him of the buyer's delivery order.

Sections 2-705(2)(b) and (c) provide the seller with a right to stop delivery of goods to a buyer who repudiates or becomes insolvent, until "acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or such acknowledgment to the buyer by a carrier by reshipment or as warehouseman." The Official Commentary indicates that this right to stop delivery holds also against a sub-buyer.²¹ Since, in neither example, had the bailee attorned to the buyer or sub-buyer, the seller would seem to have a right to stop delivery, unless by his resale the buyer was able to defeat it.²²

Section 2-403(1) provides that the buyer secures power to defeat his seller's rights "when goods have been delivered [to him] under a transaction of purchase." Section 2-403(2) likewise gives the buyer power to defeat his seller's rights when there has been an "entrusting

²¹ UCC § 2-705, Comment 2.

²² Cf. Uniform Sales Act (hereinafter USA) § 62, which provided that: Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

of possession" of the goods to him by the seller.²³ Apparently, the term "delivered" and the phrase "entrusting of possession" are synonymous. The result, then, would be that in neither example did the buyer have power to defeat either his seller's right to stop delivery or his claim to the goods, since the carrier and warehouseman had not agreed with the buyer, or sub-buyer, to deliver to him. Without attornment, the goods would seem not to have been "delivered" or "entrusted" by the seller. That is, goods are not "delivered" or "entrusted" until the buyer has secured control of them. Until attornment to him by the bailee, the buyer is one step removed from control. In both examples, any agreement by the bailee to deliver was made with the seller and, so far as the bailee and buyer are concerned, is tentative and revocable, at least until the bailee has agreed with the buyer to deliver to him.²⁴ Applying Sections 2-403(1) and (2), the result is that the buyer lacked power to defeat the right of his seller to stop delivery.²⁵

Does the sub-buyer have another argument? Notice that in Example 1 the sub-buyer is transferee of the document of title issued to the seller and, by him, indorsed and delivered to the buyer. Does transfer to the buyer of a non-negotiable document enable him to resell free of the seller's claim? Clearly not. Section 7-504(1) provides that:

A transferee of a document, whether negotiable or non-negotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey.

The Comment to this section makes clear that delivery by the seller of a non-negotiable document was not intended to have the same effect as a delivery of the goods themselves, stating:

[S]ubsection (1) empowers the transferor of a non-negotiable document to transfer only such rights as he himself has or has "actual authority" to convey. In contrast to situations involving the goods themselves the operation of estoppel or agency principles is not here recognized to enable the transferor to convey greater rights than he actually has.

²³ If the buyer was a "merchant who deals in goods of that kind" and the sub-buyer a "buyer in ordinary course of business."

²⁴ See UCC § 7-303.

²⁵ The following cases, decided under common law, are in accord: *Delta Bag Co. v. Kearns*, 112 Ill. App. 269 (1904); *Clapp Bros. v. Sohmer & Co.*, 55 Iowa 273, 7 N.W. 639 (1880); *Pattison v. Culton*, 33 Ind. 240 (1870).

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This was the approach taken under the predecessor uniform acts,²⁶ with one exception.²⁷

(2) Carrier or Warehouseman Holds Under a Non-Negotiable Document but Has Delivered or Attorned to the Buyer or Sub-Buyer

What if the bailee, who holds the goods at the time of their sale, has delivered these goods to the buyer before that buyer resells? Or, if the buyer has not taken the goods before their resale, what if the carrier or warehouseman delivers or attorns to the sub-buyer before the seller gives notice of his claim to these goods? As examples, let us consider the two following transactions:

- (3) The seller ships under a straight bill, buyer named consignee. After the goods arrive and are delivered to him by the carrier, the buyer resells.
- (4) At the time of their sale a warehouseman holds the goods for the seller under a non-negotiable receipt. The seller indorses and delivers this receipt to the buyer, to whom the warehouseman has not delivered or attorned at the time of resale. After resale, the buyer indorses and delivers to the sub-buyer the

²⁶ USA § 34; Uniform Warehouse Receipts Act (hereinafter UWRA) § 42; Uniform Bills of Lading Act (hereinafter UBLA) § 33; *Kasden v. New York, N.H. & H.R.R.*, supra note 4; *Quality Shingle Co. v. Old Ore. Lumber & Shingle Co.*, supra note 4.

In *Quality Shingle Co.*, the seller shipped under a straight bill, consigning to himself, which he indorsed in blank and delivered to the buyer in return for a check, which was later dishonored. The buyer immediately resold, delivering this bill to the sub-buyer. At the time the seller gave notice to stop delivery, the carrier had not attorned to the buyer or sub-buyer. The court held that dishonor of the check defeated the buyer's rights and that the sub-buyer, as transferee of the straight bill, secured no greater rights than had the buyer.

²⁷ USA § 20(4). When the seller attaches a draft to the bill of lading and forwards these to his buyer for acceptance of the draft, this section provides that:

If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts, making the transfer wrongful.

The distinction between bills negotiable in form and the straight bill is disregarded. The idea seems to have been that an appearance that the buyer is owner results when the seller names the buyer consignee or indorses to him. When a sub-buyer relies on this appearance an estoppel should result in his favor against the seller/consignor. 2 *Williston, Sales* § 292 (Rev. ed. 1948). This approach is altogether inconsistent with the idea that transfer of a document of title does not fix the transferee's rights against third persons unless surrender of the document is required on demand for the goods from the bailee. The fact that the bill is not negotiable serves to warn the transferee from the buyer of a possible right by the consignor to stop the goods in transit. *Gass v. Southern Pac. Co.*, supra note 4, and, query whether USA § 62, supra note 22, might not displace USA § 20(4), at least where a straight bill is involved.

receipt given to him by the seller. Before the seller notifies the warehouseman to stop delivery, the sub-buyer presents this receipt to the warehouseman, who then delivers the goods to him.

Notice that in both examples the seller's right to stop delivery was obviously lost, since the bailee had turned over the goods before the seller gave notice. The question, then, is whether the seller's right to recover the goods survived his right to stop their delivery.²⁸

The answer to Example 3 is clear. Once the carrier turned over the goods to the buyer, the buyer secured the power to resell free of the seller's claim. So far as Section 2-403(1) is concerned, the buyer was then able to defeat the seller's claim since the goods were "delivered" to him. Likewise, under Section 2-403(2), an "entrusting of possession" occurred when the carrier delivered.

The result should be the same for Example 4.²⁹ Section 7-504(1) forestalls any claim based upon transfer of the non-negotiable receipt. Even so, the sub-buyer was not only the "transferee" of a document of title, but was also a "purchaser for value" of goods "delivered under a transaction of purchase" and could, as a result, succeed under Section 2-403(1). Presumably, this section requires that he have given "value" relying on the fact that the goods have been "delivered" to the buyer. While he did give "value" when the resale was made, at that time the warehouseman had not "delivered" goods to the buyer. However, the goods were "delivered" to the buyer when the sub-buyer presented the indorsed receipt and was handed the goods. Since the buyer's right to the price, contingent upon delivery, became fixed when the warehouseman turned over the goods, the sub-buyer did in fact give "value" for goods "delivered" to the buyer.³⁰ As a result, the seller's claim would appear not to hold against the sub-buyer.

²⁸ This was the point at issue in *Weyerhaeuser Timber Co. v. First Nat'l Bank*, supra note 8.

²⁹ Accord, *United States Wind Engine & Pump Co. v. Oliver*, 16 Neb. 612, 21 N.W. 463 (1884) (common law). For a similar result based on different reasoning, see *Wigton v. Bowley*, 130 Mass. 252 (1881) (common law). Contra, *Freeman v. Kraemer*, supra note 8.

In *Freeman*, the seller shipped under a non-negotiable bill, buyer named consignee. Attaching a sight draft to the bill, he arranged for collection of the price by his bank. The buyer did not pay when these were presented. Instead, he immediately resold, instructing the carrier to deliver to the sub-buyer. This the carrier did, the sub-buyer lacking notice of the seller's claim both at the time of resale and when he received the goods. The court held that since he had not honored the draft the buyer lacked power to transfer a good title to the sub-buyer. Under UCC §§ 2-403(1) and (2) the buyer has power to transfer all rights of the seller even though "it was agreed that the transaction was to be a 'cash sale.'" UCC § 2-403(1)(c).

³⁰ UCC §§ 1-201(44)(c), 2-507(1), 2-503(4)(b). The seller's claim might also be cut off under UCC §§ 2-403(2), 1-201(9).

When a carrier or warehouseman has delivered or attorned to the buyer at the time of resale but has not delivered or attorned to the sub-buyer when the seller gives notice of his claim, an altogether different question arises. The following transactions will serve as illustrations:

- (5) Following their sale the seller hands over the goods to the buyer. The buyer warehouses these goods, taking a non-negotiable receipt in his own name. After resale he indorses and delivers this receipt to the sub-buyer. Before the warehouseman has attorned to the sub-buyer, the seller gives notice of his claim.
- (6) The seller ships under a straight bill, buyer named consignee, which he turns over to the buyer. When the goods arrive the buyer arranges for reshipment. This reshipment is made under a straight bill which the carrier issues to the buyer, the buyer named both consignor and consignee. On resale he indorses and delivers this exchange bill to the sub-buyer. The seller gives notice of his claim before the carrier has attorned to the sub-buyer.³¹

In neither example does the seller have any right to instruct the bailee to withhold the goods from the buyer or sub-buyer. So far as Example 5 is concerned, a right to stop delivery never existed, since the buyer himself warehoused the goods in his own name. In Example 6, his right to stop delivery was lost on reshipment, since the carrier then attorned to the buyer.³² As a result, at the time of resale, the goods had been "delivered," or their possession had been "entrusted" to the buyer. Under Section 2-403(1) the buyer then secured power "to transfer a good title to a good faith purchaser for value" or, under Section 2-403(2), he secured power "to transfer all rights of the entruster to a buyer in ordinary course of business."

Notice, however, that in both examples the sub-buyer was "transferee" of a non-negotiable document of title, to whom the bailee had

³¹ A similar series of transactions was involved in *Weyerhaeuser Timber Co. v. First Nat'l Bank*, supra note 8; *John S. Hale & Co. v. Beley Cotton Co.*, supra note 8; *National Bank of Commerce v. Chicago, B. & N.R.R.*, 44 Minn. 224, 46 N.W. 342 (1890). In all three cases payment was to be made in exchange for the goods. Since payment was not made, each court held that the buyer lacked the power to defeat his seller's claim. Under UCC §§ 2-403(1) and (2) the buyer has power to transfer all rights of his seller even though "the delivery was in exchange for a check which is later dishonored, or it was agreed that the transaction was to be a 'cash sale.'"

³² UCC § 2-705(2)(c). Accord, *In re W.A. Patterson Co.*, 186 Fed. 629 (8th Cir. 1911) (common law). The Official Comment suggests that a "diversion" is not to be taken as a "reshipment." UCC § 2-705, Comment 3. So long as the buyer appears as consignor on the exchange bill, the fact that there was "diversion" instead of "reshipment" ought not to prejudice the sub-buyer. Cf. *Cashmere Fruit Growers' Union v. Great Northern Ry.*, 149 Wash. 319, 270 Pac. 1038 (1928).

not delivered or attorned when the seller gave notice of his claim. As "transferee" of the non-negotiable document, Section 7-504(1) provides that he "acquires the title and rights which his transferor had or had actual authority to convey." To regard the sub-buyer as a "transferee," instead of a "purchaser" or "buyer in ordinary course of business," enables the seller to retake the goods, regardless of the resale. The question is whether Section 7-504(1) has exclusive application to all transactions that fall within its literal terms. In other words, when the sub-buyer takes a non-negotiable document, and the bailee has not delivered or attorned to him, does he secure *only* "the title and rights which his transferor had or had actual authority to convey?" The text of the sub-section surely does not require this reading.⁸³ Nor does it seem that a preemptive application was intended. The Official Comment suggests that "a consignee who makes payment to his consignor against a straight bill of lading can thereby acquire the position of a good faith purchaser of goods under provisions of the Article of this Act on Sales (Section 2-403)."⁸⁴

There is no apparent conflict between Sections 7-504(1) and 2-403(1) and (2) so long as the transaction involves a non-negotiable document.⁸⁵ This is so because all transactions within the literal scope of Section 7-504(1) are not also within the purview of Sections 2-403(1) and (2). For instance, suppose that the seller ships under a straight bill, naming himself consignee, which he indorses and delivers to the buyer. On resale the buyer indorses and delivers this bill to the sub-buyer. Unless the carrier has attorned to the buyer at the time of resale, or afterwards to the sub-buyer, the sub-buyer cannot claim successfully as a "purchaser" or "buyer in ordinary course" under Sections 2-403(1) or (2) since the goods have not been "delivered" or "entrusted." Section 7-504(1) here applies to forestall a claim based on the fact that the seller indorsed and delivered the non-negotiable bill to the buyer. In other words, Section 7-504(1) was expected to protect the seller from a resale that occurs before the buyer has secured control of the goods.⁸⁶ It appears to have no

⁸³ Boshkoff, *Documents of Title: A Comparison of the Uniform Commercial Code and Other Uniform Acts, with Emphasis on Michigan Law*, 59 Mich. L. Rev. 711, 730 (1961). But cf. Braucher, *Documents of Title*, §§ 5.32, 6.25 (1958 ed.).

⁸⁴ UCC § 7-504, Comment 1.

⁸⁵ Negotiation of a negotiable document serves to transfer the bailee's agreement. UCC § 7-502(1)(d). On the other hand, transfer of a non-negotiable document does not of its own force transfer the bailee's agreement. The transfer is incomplete until the bailee attorns to the transferee. So long as a negotiable document is involved, it makes some sense to relate ownership of the goods to the phase of the transaction that involves the document. But, given the fact that a non-negotiable document does not represent control of the goods, there is no reason to make all claims that relate to the goods depend on the rights secured on transfer of the document.

⁸⁶ Accord, cases and statutes cited supra note 27; USA § 62, supra note 22.

USA § 62, gives explicit protection to the seller's right to stop in transit. While no

proper application when resale occurs after the buyer has secured such control.⁸⁷

(3) Waiver by the Seller of His Right to Stop Delivery

Usually, when the seller ships under a straight bill, his right to stop delivery holds until the carrier has turned over the goods, or attorned, to the buyer. But this is not always true. The following transaction will illustrate:

- (7) The buyer, to fulfill a previous contract with the sub-buyer, orders goods from the seller with an instruction to ship to the sub-buyer. The buyer becomes insolvent, but not until after the seller has accepted his offer and shipped, sub-buyer named consignee on a straight bill.

Does the seller here have a right to stop delivery? Apparently, he does not. His right to the goods can, of course, be waived by his consent. The Official Comment suggests that direct shipment might properly be treated as evidence of consent to the resale.⁸⁸ In other words, in the transaction at hand, the goods were "delivered" to the buyer at the place of shipment and, on his behalf, shipped by the seller to the sub-buyer. Such was the rule at common law.⁸⁹

exact counterpart of this section appears in the Code, the same result is achieved by §§ 2-403(1) and (2) and 7-504(1). Until goods are "delivered" or "entrusted," the seller's right to stop delivery survives, since, under § 2-403, the buyer lacks the power to defeat his seller's claim. Section 7-504(1) then applies to forestall any claim by the sub-buyer based on transfer of a non-negotiable document.

⁸⁷ National Bank of Bristol v. Baltimore & O. R.R., 99 Md. 661, 59 Atl. 134 (1904). Accord, Western Union R.R. v. Wagner, 65 Ill. 197 (1872).

In National Bank of Bristol, after loading the goods on board a railroad car, the seller had permitted the buyer to ship, the buyer in exchange giving his check. Shipment was under an order bill, surrender of which was required on delivery, the buyer named both consignor and consignee. On the face of the bill was printed the legend "Not Negotiable." The buyer pledged this bill with his bank immediately after its issue to him. Afterwards his check given to the seller was dishonored. The seller demanded and received the goods from the carrier. Pressed with the argument that the bank secured no rights from transfer to it of a non-negotiable bill, the court held that:

[If] a loss must fall either upon the bank or upon (the seller), then, wholly aside from all question respecting the negotiability of the bill of lading, the doctrine imposing the loss upon the person by whose carelessness (the buyer) was enabled to represent to the bank that the property was his, that loss thus occasioned by that representation must fall upon (the seller). 99 Md. 661, 681, 59 Atl. 134, 138 (1904).

⁸⁸ UCC § 2-705, Comment 2.

⁸⁹ Neimeyer Lumber Co. v. Burlington & M.R.R., 54 Neb. 321, 74 N.W. 670 (1898); Treadwell v. Aydtlett, Robinson & Co., 56 Tenn. 388 (1872); Memphis & L.R.R. v. Freed, 38 Ark. 614 (1862). But see Delta Bag Co. v. Kearns, supra note 25.

In Neimeyer Lumber Co., the seller shipped from Waldo, Arkansas, to the sub-buyer, at Omaha, Nebraska. The buyer was located at Dallas, Texas. The seller had accepted the buyer's order "Prices F.O.B. Omaha, Nebraska." The court held that the goods were "delivered" to the buyer at Waldo. The F.O.B. term was treated only as evidence that the buyer was to deliver to the sub-buyer at Omaha, not as evidence that the seller was to deliver to the buyer there.

(4) Carrier or Warehouseman Holds Under a Negotiable Document

Ironic as it may seem, the seller's rights are less vulnerable if the buyer holds a negotiable document when he resells. For example, suppose the following:

- (8) Following their sale, the seller hands over the goods to the buyer who warehouses them, taking a negotiable receipt to his own order. On resale he delivers this receipt to the sub-buyer, but without his indorsement. Before the sub-buyer is able to get this indorsement, he learns of the seller's claim.

Here, the seller's claim survived the resale. Had the receipt been "duly negotiated" to the sub-buyer, this claim would have been defeated.⁴⁰ But, since the sub-buyer learned of the seller's claim before obtaining the buyer's indorsement, there was not a "due negotiation." Before a "due negotiation" can occur, there must first be a "negotiation." Unless the document is delivered with an indorsement to the transferee, or his order, or to bearer, the transaction does not amount to a "negotiation."⁴¹ Until these requirements of form have been satisfied the qualitative features of the transaction are not important.⁴² The point in time at which "due negotiation" is determined depends on the time at which "negotiation" occurs, which would be the time at which the buyer indorsed. Had the goods themselves been resold, the sub-buyer's rights would be fixed at the moment of resale, regardless of the time at which the buyer handed over the goods to him.⁴³

Once there has been a "negotiation," the qualitative features of the transaction determine whether it qualifies as a "due negotiation." Section 7-501(4) provides:

A negotiable document of title is "duly negotiated" when it is negotiated . . . to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation.

⁴⁰ UCC § 2-502.

⁴¹ UCC §§ 7-501(1), 7-506.

⁴² Braucher, *supra* note 33, at § 5.31. Accord, 2 Williston, Sales § 430 (Rev. ed. 1948).

The same rule holds for commercial paper. UCC § 3-201; Britton, Bills and Notes § 74 (1943). The rule also applies to investment securities. UCC § 8-301. The insistence on indorsement in transactions like the one at hand has been questioned. Steffen, *Cases on Commercial and Investment Paper* 350-51 (1954). Were the indorsement of a remote transferor missing, this would serve as notice of defenses or claims.

⁴³ UCC § 1-201(32) and (33), 2-403(1), 1-201(9), 2-403(2).

As the Official Commentary⁴⁴ indicates, it seems to follow from the "regular course" requirement that a document can be "duly negotiated" only by "a person in the trade." Even when the document is taken from "a person in the trade" the transaction itself might be out of the "regular course," as, for instance, "the snapping up of goods for quick resale at a price suspiciously below the market." Notice also the additional stipulation that "receiving the document in settlement or payment of a money obligation" cannot amount to a due negotiation.⁴⁵ Had the goods themselves been resold, the sub-buyer could succeed under Section 2-403(1) as a purchaser for "value." So far as Section 2-403(1) is concerned, "a person gives 'value' for rights if he acquires them as security for or in total or partial satisfaction of a pre-existing claim."⁴⁶

III. THE BUYER

A. *The Buyer's Right to Recover Undelivered Goods from an Insolvent or Repudiating Seller: The Effect of Resale by the Seller*

The seller's right to recover goods delivered to a buyer who repudiates or is unable to pay has its counterpart in the buyer's right to reach goods in the hands of a seller who repudiates or becomes insolvent. When the buyer has made a payment on the price of undelivered goods, his only adequate remedy may well be his right to recover the goods for which he bargained, since a judgment for the amount of his advance on the price, and for other damages resulting from repudiation, may be collectible for only a few cents on the dollar.

The Code deals with the question of the buyer's right to reach goods in the hands of a defaulting or insolvent seller in three provisions. First, Sections 2-716(1) and (2) give a right to specific performance of the contract. Alternatively, Section 2-716(3) provides for replevin. Finally, Section 2-502 introduces an additional remedy in the event of the seller's insolvency. Specific performance will be the only remedy available when no goods have been "identified" to the contract⁴⁷ at the time of repudiation. If, but only if, goods have been identified to the contract when repudiation occurs, the right to replevy them is given on two conditions. First, if these goods have

⁴⁴ UCC § 7-501, Comment 1.

⁴⁵ Cf. *Cremonin v. Wahhab*, 275 App. Div. 561, 88 N.E.2d 324, 90 N.Y.S.2d 604 (1949).

⁴⁶ UCC § 1-201(44)(b). However, he could not succeed as a "buyer in ordinary course" under § 2-403(2), since "buying" does not include the acquiring of goods "as security for or in total or partial satisfaction of a money debt." UCC § 1-201(9).

⁴⁷ UCC § 2-501.

been shipped under "reservation"⁴⁸ the buyer is given the right to recover them, provided, of course, that he tenders their price. Otherwise, recovery in replevin is not permitted unless the buyer shows that like goods are unavailable on the market at a reasonable price. Should the buyer be unable to demonstrate a right to replevin under this section, in the event of his seller's insolvency he is permitted to recover goods which have been "identified" to the contract, provided only that the insolvency occurs within ten days following receipt by the seller of the first installment of the price.⁴⁹

The seller's claim against goods delivered to a buyer who is insolvent or who refuses to pay does not survive resale of the goods to an innocent buyer-on-resale. Similarly, whatever right the buyer has to recover goods from a defaulting or insolvent seller may be lost on resale of these goods by the seller. The following transaction will serve to illustrate:

- (9) A contract for the sale of "identified" cotton calls for delivery at the seller's place of business. Before the time for delivery has arrived, the seller discovers a more advantageous offer and resells the cotton. The buyer-on-resale was not aware of the buyer's claim.

Has the buyer-on-resale a defense to the buyer's action in replevin brought against him? A resale of undelivered goods falls within Section 2-403(2). Until the buyer has in fact received his goods, there is an "entrusting of possession" of these goods to the seller.⁵⁰ Provided that he is a "merchant who deals in goods of that kind," the seller has the power to "transfer all rights" of the buyer to a "buyer in ordinary course of business."

One further point deserves notice. Given the definition of "buyer in ordinary course," it seems apparent that the resale defeats the buyer's rights even though the goods are not afterwards delivered by the seller to the buyer-on-resale.⁵¹ This represents a departure from the Uniform Sales Act.⁵² The rule there provided that the buyer's claim survived unless resale was followed by delivery to the buyer-

⁴⁸ When the place for delivery is the place of shipment but the price is not due until arrival of the goods at their destination, the seller is permitted to ship under "reservation," that is, consign to himself or to his own order. This right to save control of the goods in transit is given only to enable him to secure payment of the price. Once shipped, the goods are owned by the buyer. UCC §§ 2-505, 2-401(2)(a).

⁴⁹ Hedged as it is with limitations, this remedy does not seem particularly helpful. Steinheimer, *Michigan Sales Law and the Uniform Commercial Code* 104 ¶ (5) (1962).

⁵⁰ UCC § 2-403(3) provides that "entrusting" includes "any acquiescence in retention of possession regardless of any condition expressed between the parties."

⁵¹ UCC § 1-201(9). Accord, Warren, *Cutting Off Claims of Ownership Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 469, 473 (1963).

⁵² USA § 25.

on-resale⁵³ who, at the time he received the goods, lacked notice of the earlier sale.⁵⁴ Even so, under the Code, unless the buyer-on-resale takes up the goods, the seller will have power to defeat his rights, either by a second resale or by a delivery to the first buyer. In fact, a delivery to the first buyer would amount to a second resale. If the first buyer secures delivery without notice of the resale, he will himself become a "buyer in ordinary course," since "buying includes receiving goods under a pre-existing contract for sale."⁵⁵

B. Carrier or Warehouseman Holds Under a Non-negotiable Document at the Time of Sale and Resale

What rights has the buyer-on-resale when the goods are held for the seller under a non-negotiable document of title? Let us consider the following hypothetical situation:

- (10) At the time of its sale a warehouseman holds "identified" cotton, for which he had issued a non-negotiable receipt to the seller. After this sale, the seller turns over a delivery order to the buyer, that is, an order addressed to the warehouseman instructing him to hold for the buyer. Before the buyer notifies the warehouseman of his rights, the seller resells this cotton, giving the buyer-on-resale a second delivery order.

Given the result reached when the seller resells goods which he himself holds, it would seem that the buyer's rights would be lost at the moment of resale. He could defeat the resulting claim of the buyer-on-resale only by either taking up the cotton or by securing acceptance by the warehouseman of his delivery order, without notice of the resale. Under the Code, however, this analogy does not hold. Instead, the buyer prevails if he is the first to notify the warehouseman of his rights, regardless of whether he secures either the goods or acceptance of his delivery order. Section 7-504(2)(b) applies, providing that:

In the case of a non-negotiable document, until but not after the bailee receives notification of the transfer, the rights of the transferee may be defeated by a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of his rights.

The predecessor uniform acts also provided for notice to the

⁵³ USA § 25; *C.I.T. Corp. v. First Nat'l Bank*, 33 Ariz. 483, 266 Pac. 6 (1928).

⁵⁴ USA § 25; *Coburn v. Drown*, 114 Vt. 158, 40 A.2d 528 (1945); *Patchin v. Rowell*, 86 Conn. 372, 85 Atl. 511 (1912).

⁵⁵ UCC § 1-201(9).

bailee, in lieu of attornment or delivery.⁵⁶ The theory seems to have been that notice was an appropriate equivalent of attornment or receipt of the goods, at least insofar as the transaction at hand is concerned.⁵⁷ The idea that notice is equivalent to attornment or delivery has been continued in the Code.⁵⁸

Given the result reached when the goods are in the seller's hands at the time of resale, it would seem to follow for the transaction at hand that resale defeats the buyer's right to the goods, provided, however, that the claim of the buyer-on-resale could be defeated if, but only if, the buyer were the first to give notice to the bailee and was not then aware of the resale and the resulting claim of the buyer-on-resale.⁵⁹

When the resold goods are in the hands of a carrier, instead of a warehouseman, a similar problem occurs. For instance, suppose the following transaction:

- (11) To deliver under a contract which calls for delivery F.O.B. the place of shipment, the seller ships under a straight bill, buyer named consignee. While in transit he resells these goods, ordering the carrier to divert the shipment to the buyer-on-resale.

What rights has the buyer to these goods? Section 7-303 gives the carrier a right to divert for the consignor, even in the face of contrary instructions from the consignee. Assuming that the carrier agrees to divert, it would seem that the consignee, by permitting shipment under a straight bill, has "entrusted" the goods to his seller,

⁵⁶ USA § 34; UWRA § 42; UBLA § 33.

⁵⁷ 2 Williston, Sales § 428 (Rev. ed. 1948). However, the transferee of a straight bill of lading cannot defeat the rights of the seller/consignor simply by notifying the carrier of the transfer to him of the bill. The seller/consignor's right to stop delivery of goods to his buyer holds also against a sub-buyer until delivery or attornment by the carrier.

⁵⁸ UCC §§ 7-504(2), 9-305.

⁵⁹ See 3 New York Law Revision Commission Study of the Uniform Commercial Code 1852 (1955). However, the text of the subsection does not in terms provide that the buyer must not be aware of the resale when he notifies the bailee of his claim. It would make some sense to disregard the fact that the buyer was aware of the resale when he notified the bailee of his rights. If notice without knowledge of the resale were required, and the buyer-on-resale later gave notice of his claim, the bailee could not easily determine to whom he should deliver. To avoid liability for conversion he might be forced to interplead. On the other hand, if notice alone were to fix the buyer's rights, the bailee could easily determine to whom he could deliver. Since the bailee, after all, is an innocent stranger to the dispute, it does seem unreasonable to involve him in it. Instead of successive sales by the owner, suppose that the goods had twice served as collateral for advances made to him. Priority between the two conflicting security interests would depend on the order of their "perfection." Perfection would be accomplished either by filing or by notice to the bailee. UCC § 9-304(3). The secured party who first perfected would have priority, even though he perfects after learning that another security interest had attached earlier. UCC §§ 9-312(a) and (b).

the consignor. Under Section 2-403(2) the seller would have power to "transfer all rights" of his buyer to a "buyer in ordinary course of business." While it does seem apparent that the buyer-on-resale could prevail under Section 2-403(2), separate treatment has been given this type of transaction. Section 7-504(3) provides that:

A diversion or other change of shipping instructions by the consignor in a non-negotiable bill of lading which causes the bailee not to deliver to the consignee defeats the consignee's title to the goods if they have been delivered to a buyer in ordinary course of business and in any event defeats the consignee's rights against the bailee.

If, following resale, the buyer-on-resale learned of the diversion or if he himself ordered it, it is not altogether clear what rights he would then have.⁶⁰ His claim seems to depend upon delivery to him by the carrier, presumably without notice of the buyer/consignee's rights.⁶¹

C. *Carrier or Warehouseman Holds Under a Negotiable Document Issued After the Sale*

Usually, the buyer's rights are secure once he has notified the bailee. But this is not always the rule. The following transaction will serve to illustrate:

- (12) At the time of their sale the goods are held under a non-negotiable warehouse receipt issued to the seller. Before the buyer notifies the warehouseman of the sale, the seller obtains a negotiable receipt covering the goods, which he "duly negotiates" to the buyer-on-resale.

Assuming that the receipt was in fact "duly negotiated,"⁶² resale would seem to defeat the buyer's rights, provided only that the warehouseman had issued the negotiable receipt before notice to him of the sale to the buyer.⁶³ Section 7-503(1)(b) provides that:

⁶⁰ 3 New York Law Revision Commission Study of the Uniform Commercial Code 1852 (1955).

⁶¹ Cf. *Bank of Litchfield v. Elliot*, 83 Minn. 469, 86 N.W. 454 (1901) (common law). Here, the buyer advanced the entire price before shipment. The seller shipped under a straight bill, buyer named consignee. He then attached to this bill a draft for the price, which he discounted with his bank. The buyer refused to honor the draft when presented, but took the grain. The bank was not successful in its action to recover the goods from the buyer. The issue was framed in terms of the seller's intent at the time of shipment. The fact of prepayment was taken to be conclusive evidence that the seller intended to transfer ownership in shipment. Surely, the fact that the buyer appears as consignee on the bill would serve as notice that he might have some right to the goods.

⁶² The formal and qualitative features of a "due negotiation" are examined in Part II (B)(4).

⁶³ *Accord, Brock v. Atteberry*, 153 La. 650, 96 So. 505 (1923).

A document of title confers no right in goods against a person who before issuance of the document had a legal interest or a perfected security interest in them and who . . . [has not] acquiesced in the procurement by the bailor or his nominee of any document of title.

It would seem that the buyer, since he failed to give notice to the warehouseman of the sale, "acquiesced in the procurement" by the seller of the negotiable receipt.